

Forum-Shifting and Human Rights: Prospects for Queering the Women, Peace and Security Agenda

ABSTRACT The adoption of the Women, Peace and Security (WPS) Agenda by the UN Security Council constituted a forum-shift by women’s rights advocates away from the human rights system. As queer critique of the WPS agenda gathers pace, this article reflects on the antecedents of the queer exclusions of the WPS agenda in international human rights law. The article thereby reveals the consequences in other international law regimes of human rights law’s queer exclusions. The article concludes with some tentative proposals to utilise the pluralism of international human rights law to expand queer possibilities for both human rights and WPS.

‘It must not be forgotten that resolution 1325 was conceived of and lobbied for as a human rights resolution that would promote the rights of women in conflict situations.’

- Radhika Coomaraswamy, *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council resolution 1325* (United Nations, 2015).

I. INTRODUCTION

The Women, Peace and Security (WPS) agenda adopted by the UN Security Council in Resolution 1325 (2000) endorsed women’s full and equal participation in conflict resolution and peacebuilding, the protection of women’s rights in conflict and relief and recovery, and the

adoption of a gender perspective throughout international peace and security. Importantly, the resolution reflected a deliberate forum-shift by women's rights advocates from the consensus-based systems of the UN General Assembly and international human rights law to the coercive power of the Security Council. Over two decades later, critique of the WPS agenda and its operationalisation through the Security Council is multi-faceted and replete.¹ This article engages with a specifically queer critique of the Women, Peace and Security (WPS) agenda and its exclusions, elucidating the ways in which the agenda's queer exclusions are fundamentally imbricated in the queer exclusions of international human rights law. The article is thereby intended to inform WPS scholars and advocates of the genealogy in human rights law of the contemporary queer exclusions of WPS. Moreover, the article seeks to alert the human rights community to the rippling and compounding consequences of international human rights law's queer limitations elsewhere in other regimes of international law.

Queer critiques of the WPS agenda might be summarised as the agenda's underpinning heteronormative assumptions, its continuing attachment to a male/female gender binary, and its emphasis on sexual danger combined with silence towards homophobic and transphobic violence. Practical and institutional exclusions include relative silence on LGBTQ (lesbian, gay, bisexual, transgender and queer) issues in the 2015 UN Global Study on WPS,² in the UN

¹ See generally, Catherine O'Rourke, *Women and the UN Security Council*, OXFORD BIBLIOGRAPHIES (21 February 2022), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0234.xml>.

² U.N., A GLOBAL STUDY ON THE IMPLEMENTATION OF UNITED NATIONS SECURITY COUNCIL RESOLUTION 1525 (2015).

Secretary-General's annual reports on WPS,³ in the Global Indicators on WPS,⁴ and in civil society monitoring of the agenda.⁵ Queer critique points to the theoretical boundaries that underpin these practical exclusions, most notably boundaries between feminist and queer theory, but also boundaries with masculinities and trans-theorising.⁶ The article seeks to elucidate these critiques by revealing their origins within well-established limitations and exclusions of gender work in international law, in particular international human rights law.⁷ A closer look at these antecedents allows for both a clearer understanding of the current limitations to more gender-inclusive and intersectional approaches to WPS, as well as to possibilities for shifting direction and to confront these limitations.

In 2000, the first WPS resolution emerged from women's human rights activism insisting gendered experiences of conflict be taken seriously in international peace and security. The now ten resolutions of the WPS agenda builds on a lineage of international law and women's human rights work. As the article elaborates, the resolution reflected a strategic decision to bring women's rights to the Security Council and to forum-shift away from the consensus-based human rights system. This women's peace activism leading to the expansive WPS

³ *Report of the Secretary-General on Women and peace and security*, U.N. Doc. S/2021/827 (2021); *Report of the Secretary-General on Women and peace and security*, U.N. Doc. S/2020/946 (2020).

⁴ INDICATORS & MONITORING: WOMEN, PEACE AND SECURITY, <https://www.peacewomen.org/security-council/WPS-indicators-and-monitoring> (last visited Aug. 3, 2022)

⁵ GLOBAL NETWORK OF WOMEN PEACEBUILDERS, <https://gnwp.org/resources/publications/> (last visited Aug. 3, 2022); NGO WORKING GROUP ON WOMEN, PEACE AND SECURITY, <https://www.womenpeacesecurity.org/analysis/> (last visited Aug. 3, 2022).

⁶ Jamie J. Hagen, *Queering Women, Peace and Security*, 92 INTERNATIONAL AFFAIRS 313, 325 (2016).

⁷ Ratna Kapur, *The (Im)possibility of Queering Human Rights Law*, in QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS, Chapter 7 (Dianne Otto ed., 2017).

agenda, though powerful and unprecedented, had some significant faults in the foundation for building a feminist future in peace and security work. Rather than focus on the compelling reasons to turn to the Security Council as a powerful forum to include discussions of gender and highlight women's experiences, we instead consider the implications of this forum-shift for the concept of gender promoted by the WPS agenda. We look to this forum-shift in order to better-understand the persistent challenges that limit queer-inclusive and feminist WPS initiatives today.

The article considers key elements of international human rights law that have been inherited by the WPS agenda and that determine the gender boundaries of the agenda. The article begins by describing the forum-shift by women's rights advocates from international human rights to the Security Council. The article then outlines foundational queer exclusions of international human rights law, namely the gender binary, heteronormativity, and the invisibility of lesbian and other non-normative gender subjects. The article traces these queer exclusions into the drafting, negotiation and ultimate text of the WPS resolutions at the Security Council. Finally, the article focuses on sexual danger as a driver of legal developments in both human rights law and WPS, and their resulting queer exclusions. Ultimately, we argue, given its antecedents in international human rights law, WPS at the Security Council would inevitably reflect human rights law's identified queer deficiencies, though further-compound them by channelling them through the coercive power of the Security Council. We conclude by proposing a re-envisioned approach to the pluralism of human rights law as an opportunity to expand queer possibilities for both human rights and WPS.

II. WOMEN, PEACE AND SECURITY AND FORUM-SHIFTING TO THE SECURITY COUNCIL

‘Forum-shifting’ is an established feature of engagement with international law.⁸ As the institutions and mechanisms of international law have proliferated, a growing number of forums are open to states, civil society and non-state actors to advance their claims and to seek favourable resolution to disputes under international law. The deliberate pursuit of more favourable forums by diverse actors has now been documented across several regimes and sub-fields of international law, including international criminal law,⁹ international fisheries law,¹⁰ and international intellectual property law.¹¹ As O’Rourke has documented elsewhere, forum-shifting has been a central element of feminist strategy in international law:

For the perspective of women’s rights advocates, the diversity of available bodies can present opportunities to ‘shop’ for more sympathetic adjudicative fora or to ‘shift’ institution in order to consolidate or strengthen a particular norm.¹²

Moreover, transnational women’s advocacy for the enhanced protection of women’s rights in conflict is an example *par excellence* of such forum-shifting.¹³

⁸ See further Catherine O’Rourke, *Feminist Strategy in International Law: Understanding its Legal, Normative and Political Dimensions*, 28 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1019 (2018).

⁹ JOOST PAUWELYN, *CONFLICT NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (CUP 2003).

¹⁰ MARGARET A. YOUNG, *TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW* (Cambridge Studies in International and Comparative Law 2011).

¹¹ Susan K. Sell, *Trips Was Never Enough: Vertical Forum Shifting, FTAS, ACTA, AND TPP* (2011) 18(2) *J. INTELL. PROP. L.* 447.

¹² CATHERINE O’ROURKE, *WOMEN’S RIGHTS IN ARMED CONFLICT UNDER INTERNATIONAL LAW* 134 (CUP 2020).

¹³ The following account of the trajectory of women’s rights in conflict under international law in this section is taken from O’Rourke *Id.* at 6-11.

The end of the Cold War brought a new era of human rights across the wider UN system,¹⁴ and with it increasing scrutiny of the Security Council and its legitimacy, including calls for the Security Council to reform, to democratise and to address the impact on human rights of its own operations.¹⁵ These calls for reform overlapped with a feminist spotlight on rights violations impacting women in conflicts such as the former Yugoslavia and Rwanda, and calls for a re-focus by the Security Council on the people affected by conflict and by its operations.¹⁶ This re-focusing is most clearly evidenced in the Council's thematic activity on the protection of civilians¹⁷ and on the themes of Children and Armed Conflict,¹⁸ and WPS. Its actions, such as advancing sanctions for use of child soldiers, not only had a bearing on other thematic agenda items, but also provided a model for the kinds of measures that it could advance in respect of thematic and human rights issues broadly.¹⁹

The Security Council made a first step towards embedding women's rights in conflict within its agenda by issuing a press release on 8 March 2000, on the occasion of International

¹⁴ See generally JULIE A. MERTUS, *THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA* (Routledge 2009).

¹⁵ Dianne Otto, *The Security Council's Alliance of Gender Legitimacy: The Symbolic Capital of Resolution 1325 in FAULT LINES OF INTERNATIONAL LEGITIMACY* 239 (Hilary Charlesworth. and Jean-Marc Coicaud eds., 2010).

¹⁶ *Id.*

¹⁷ Inaugurated by Security Council Resolution 1265, see S.C. Res. 1265 (Sep. 17, 1999).

¹⁸ Inaugurated by Security Council Resolution 1261, see S.C. Res. 1261 (Aug. 30, 1999).

¹⁹ Tonderai W. Chikuhwa, *The Evolution of the United Nations' Protection Agenda for Children: Applying International Standards in CHILD SOLDIERS IN THE AGE OF FRACTURED STATES* 37, 42 (Scott Gates & Simon Reich eds., 2010).

Women's Day, declaring that 'members of the Security Council recognize that peace is inextricably linked with equality between women and men'.²⁰ A series of further steps included an arria formula meeting,²¹ an open debate on women, peace and security and finally the adoption of Resolution 1325 in October 2000.²² The Resolution provides for four principal pillars of priority action in which women's rights should be advanced, namely: Participation, Protection, Prevention, and Relief and Recovery. Thus, the final critical step towards embedding women's rights in conflict within the Security Council agenda occurred in 2000 with the adoption of Resolution 1325 by the Security Council.²³ The resolution is widely celebrated for its recognition of women's gender-specific experiences of conflict and of women as agents of conflict transformation.²⁴

Advocacy for the adoption of Resolution 1325 provides an excellent example of forum-shifting. The resolution is viewed as the product and outcome of the women's movement, and belonging to transnational feminist momentum since the UN's Fourth World Conference on

²⁰ UN, *Peace Inextricably Linked with Equality between Women and Men Says Security Council*, in *International Women's Day Statement*, SECURITY COUNCIL PRESS RELEASE (Mar. 8, 2000) <https://press.un.org/en/2000/20000308.sc6816.doc.html>

²¹ U.N. Secretariat, *Background Note on the "Arria-Formula" Meetings of the Security Council Members*, UN SECURITY COUNCIL (Oct. 25, 2002) <https://www.un.org/securitycouncil/content/background-note> .

²² S.C Res. 1325 (Oct. 31, 2000).

²³ *Id.*

²⁴ Carol Cohn, Helen Kinsella & Sheri Gibbings, *Women, Peace and Security Resolution 1325*, 6 INTERNATIONAL FEMINIST JOURNAL OF POLITICS 130 (2010).

Women in Beijing.²⁵ The desire for clear legally-binding obligations on states was a key motivation for transnational and insider activists moving feminist demands from the international human rights system and UN General Assembly to the Security Council.²⁶ While critical questions might be asked as to the efficacy and wisdom of this strategy, it nevertheless was a clear strategy to exploit the pluralism and diversity of institutions regulating women's rights in conflict.

The dedicated activity of the Security Council on issues of WPS since the adoption of Resolution 1325 in 2000, including nine further resolutions and a range of institutional mechanisms,²⁷ has moved the Security Council to the epicentre of policy and advocacy concerning women's rights in conflict under international law. The Charter provisions dealing with the powers of the Security Council make no formal reference to human rights, nevertheless, the Charter's preambular and article 1 commitments to 'promote and encourage respect for human rights' imply a role for all UN organs. These Charter provisions have been the subject of highly varying interpretation by the Security Council during the seven decades of its operation.²⁸ Given the Security Council's historical lack of engagement on matters of

²⁵ See further CYNTHIA COCKBURN, *FROM WHERE WE STAND: WAR, WOMEN'S ACTIVISM AND FEMINIST ANALYSIS* (Zed Books 2007); SANAM NARAGHI ANDERLINI, *WOMEN BUILDING PEACE: WHAT THEY DO, WHY IT MATTERS* (Lynne Reiner 2007).

²⁶ Cockburn, *supra* note 25, at 132-155.

²⁷ See further O'Rourke, *supra* note 12, at 52-55, 79-83, 97-103.

²⁸ JARED GENSER & BRUNO STAGNO-UGARTE, *THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS* (CUP 2014).

human rights,²⁹ much less women's rights, this turn in the regulation of women's rights in conflict under international law is surprising.

WPS should therefore be studied and understood as a deliberate and strategic forum-shift from the consensus-based mechanisms of the UN General Assembly and international human rights law to the coercive power of the Security Council. This account of WPS and forum-shifting to the Security Council might readily be told as a progress narrative,³⁰ in which human rights and women's rights came to infuse the daily work and modus operandi of the Security Council. The remaining sections, however, turn a more critical eye to this forum-shift, interrogating the terms of engagement for women's participation and women's recognition from the human rights system's early antecedents in the abolitionist movement, right through to the contemporary operation of the CEDAW Committee. This critical re-telling identifies the queer exclusions that remained embedded in ostensibly progressive developments around women's rights and human rights. These exclusions have left a challenging legacy for WPS efforts at the Security Council.

III. INTERNATIONAL HUMAN RIGHTS LAW AND ITS QUEER EXCLUSIONS

A. The Gender Binary

The gender binary hinges on a definitional framing that there are only two genders, male and female. The limiting framework of the gender binary was developed within a Western understanding of sex and gender norms. The problematic gender binary framework persists,

²⁹ *Id.* See generally SIDNEY D. BAILEY, *THE UN SECURITY COUNCIL AND HUMAN RIGHTS* (St Martin's Press 1994).

³⁰ Siobhán Mullally, *Domestic Violence Asylum Claims And Recent Developments In International Human Rights Law: A Progress Narrative?* 60 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 459 (2011).

despite growing international recognition of diverse gendered experiences that are not encapsulated by such a narrow definition of gender. Several non-Western cultures account for gender identity well-beyond the male-female binary including the Two-Spirit amongst indigenous tribes in North America, hijras in India and Pakistan, and fa'afafine in some Pacific countries. As this section outlines, adherence to the gender binary in international human rights law has led to a gender analysis that is failing to keep up with the push for gender protections that move beyond essentialist argumentation about women as victims, men as perpetrators and assumed heterosexuality.

International human rights law's adherence to a gender binary has lengthy historical antecedence. Going back to the early 20th century abolitionist origins of contemporary international human rights law, Dianne Otto surfaces the three enduring female tropes of international human rights law as, first, the wife and mother who needs protection; second, the formally equal woman with the man in the public realm; and, third, the 'victim' woman produced by colonial narratives of gender and women's sexual vulnerability.³¹ Further, each of these tropes is premised on a male-female binary, namely the male protector; the formally equal man; and either the male 'native' or male 'saviour', revealing also the deep imbrications of these gender tropes in colonial and racist binaries.³²

³¹ Dianne Otto, *Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law* in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 105-129 (Doris Buss & Ambreena Manji eds., 2005).

³² ANNE MCCLINTOCK, IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEST (Routledge 1995).

Each of the identified enduring female tropes preceded the Universal Declaration of Human Rights and survived into the post 1945 human rights canon, including into the text of CEDAW. For example, the protective trope is evident in the CEDAW Convention's permissive approach to sex-specific restrictions on women's work conditions (article 11; the formally equal trope is evident throughout the Convention's express non-discrimination framework; and the colonial victim subject is particularly evidence in articles 6 and 14, which envisage the imperial victim subject of trafficking, prostitution and rurality. More liberatory approaches to women's human rights also find expression in the Convention, for example in the definition of discrimination as both direct and indirect, public and private (article 2); provisions for affirmative approaches to equality (article 4); and article 16 urging states to recognize women's unpaid work. Nevertheless, as Otto delineates, this gender binary is essential for enabling a gender hierarchy in international human rights law, which privileges as 'universal' the bearer of masculine characteristics, while marginalising as 'particular' the rights of women.³³

Rejection of the gender binary is a cornerstone of queer theory and trans theory.³⁴ As trans scholars Susan Stryker, Paisley Currah and Lisa Jean Moore explain, trans theory:

aims to resist applications of 'trans' as a gender category that is necessarily distinct from more established categories such as 'woman' or 'man'. Rather than seeing genders as classes or categories that by definition contain only one kind of thing..., we understand genders as potentially porous and permeable spatial territories (arguable

³³ *Id.*

³⁴ See EVE K. SEDGEWICK, *EPISTEMOLOGY OF THE CLOSET* (University of California Press 1990), JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX* (Routledge 2011).

numbering more than two), each capable of supporting rich and rapidly proliferating ecologies of embodied difference.³⁵

Resistance to the harms caused to sexual and gender minorities when enforcing the gender binary, through what Dean Spade calls administrative violence, therefore drives much queer and trans advocacy for issues including prison reform, healthcare access and for proper identity documents (e.g. drivers licenses, birth certificates, passports, public benefit cards and immigration documents).³⁶ While the human rights system has offered pockets of support to the principle of self-determined gender,³⁷ the issue remains largely marginal and – unlike replete examples of the biologically-determined gender binary in human rights – lacks any clear treaty basis. Consequently, international human rights law’s adherence to the gender binary can position it as oppositional to these campaigns for queer liberation.

B. Heteronormativity

³⁵ Susan Stryker, Paisley Currah & Lisa Jean Moore, *Introduction: Trans-, Trans, or Transgender?* 36 WOMEN’S STUDIES QUARTERLY 11, 12 (2008).

³⁶ DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW* 77- 84 (Duke University Press 2015).

³⁷ Independent Expert on Sexual Orientation and Gender Identity, *The Struggle of Trans and Gender-Diverse Persons*, U.N. O.H.C.H.R. <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons> ; also important line of gender-recognition jurisprudence from the Eur.Ct. H.R. which has not been replicated in the other regional systems, nor by the UN human rights treaty bodies, see further Eur. Ct. H.R. *Gender Identity Issues*, PRESS UNIT (May 2022) https://www.echr.coe.int/Documents/FS_Gender_identity_eng.pdf.

Heteronormativity – the belief that heterosexuality is the default, preferred or normal mode of sexual orientation – has similarly lengthy antecedence to the gender binary in international human rights law. Queer theorists have shown how this Western social norm of heteronormativity organizes social, political and economic norms about both sex and gender.³⁸ Furthermore, black feminist Patricia Hill Collins illustrates how this entanglement between binary thinking and heteronormativity, ‘underpins intersecting oppressions of race, class, gender and sexuality’ and in turn ‘reveals that heterosexuality is juxtaposed to homosexuality as oppositional, different and inferior other’.³⁹ As a result, women are faced with what Adrienne Rich calls compulsory heterosexuality, resulting in lesbian invisibility.⁴⁰ Consider, for example, the language of the Universal Declaration on Human Rights and the two Covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – all of which are silent on sexuality and sexual orientation as prohibited grounds for discrimination. This silence is arguably particularly disappointing, given the well-known and well documented Nazi targeting of homosexuals. The underpinnings of the modern human rights system in the non-recurrence of Nazi harms is otherwise largely clear.

³⁸ Michael Warner, *Introduction: Fear of a Queer Planet* in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993); Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality* in *THE LESBIAN AND GAY STUDIES READER* Chapter 1 (Henry Abelove, Michele Aina Barale & David M. Halperin 1993).

³⁹ PATRICIA H. COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (Routledge 2009).

⁴⁰ Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980).

Heteronormativity has likewise manifested in key international sites and contestation around consensus statements of women's rights over the language of gender. These tensions were most blatant in the 1995 Beijing Fourth World Conference for Women. In the negotiation of the outcome documents, the language of 'sexual orientation' was ultimately deleted.⁴¹ Lesbian women had made a strategic decision to pursue language of 'sexual orientation' rather than 'lesbian' in the outcome documents, believing such language to have greater prospect of success, not least because it had precedence in the international human rights system.⁴² The deletion of 'sexual orientation' language from the outcome documents made use of the language of 'gender' even more important. Was gender to mean 'sex', or was gender to open the door to alternative non-binary gender identities and forms of sexual expression? This was a question that clouded much debate at Beijing, as women's rights activists and states used the language of 'gender', but with different meanings. Ultimately the inclusion of gender language was secured through effectively conceding gender as a synonym for women. The 'Statement by the President of the Conference on the Commonly Understood Meaning of the Term "Gender"', provided that:

- (1) the word "gender" had been commonly used and understood in its ordinary, generally accepted usage in numerous other United Nations forums and conferences;
- (2) there was no indication that any new meaning or connotation of the term, different from accepted prior usage, was intended in the Platform for Action.

⁴¹ For a comprehensive account of these dynamics, see Dianne Otto, *Lesbians? Not in My Country: Sexual Orientation at the Beijing World Conference on Women*, 20 ALTERNATIVE LAW JOURNAL 288-290 (1995).

⁴² Most notably through the *Toonen* decision of the Human Rights Committee, see *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

3. Accordingly, the contact group reaffirmed that the word "gender" as used in the Platform for Action was intended to be interpreted and understood as it was in ordinary, generally accepted usage.⁴³

Out of 189 participating states, just eight made interpretive statements that they understood the 'other status' grounds on which discrimination was prohibited to include 'sexual orientation'.⁴⁴ The Beijing outcome documents are themselves silent on 'sexual orientation' and nowhere make reference to 'sexual rights'.

It is in this vein that queer postcolonial scholars, such as Kapur, have critiqued reformist initiatives to enhance LGBTQ protections under international human rights law, such as the Yogyakarta Principles. The Yogyakarta Principles 'are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply.'⁴⁵ The Principles were initially drafted by a group of human rights experts in 2006 as a set of 29 Principles including The Right to Equality and Non-Discrimination, the Right to Participate in Cultural Life and the Right to Promote Human Rights. The document sets out how human rights actors but also the media, non-governmental organizations and funders should engage

⁴³ *Report of the United Nations Conference on Human Settlements (Habitat II), Annex V, Statement on the Commonly Understood Meaning of the Term "Gender"* (Istanbul, 3-14 June 1996) presented at the Fourth World Conference on Women by the President of the Conference.

⁴⁴ Otto, *supra* note 41.

⁴⁵ The full text of the Yogyakarta Principles and the Yogyakarta Principles plus 10 are available at: www.yogyakartaprinciples.org.

with sexual orientation and gender identity (SOGI) issues in international law.⁴⁶ Queer and postcolonial scholars recognise the important advances represented by the Yogyakarta Principles and their growing legitimacy within international human rights law. To quote Kapur: ‘In the choice between criminality and legitimacy, the latter is clearly preferable to being an ostracised criminal deviant’.⁴⁷ Nevertheless, the Principles remain a powerful illustration of the limitations of human rights engagement. As Otto argues compellingly, the Yogyakarta Principles, while important, are largely based on biological assumptions about sexuality, located in a dualist heteronormative framework that ignores the dynamic understandings of gender and gender identity as socially constructed. Gender remains confined to two categories, male and female, with the ‘gay’ family constructed as monogamous, nuclear and having an emphasis on procreation. And gender identity continues to be associated with transgender persons rather than as something every person possesses.⁴⁸ According to Kapur, the ultimate goal of public visibility and inclusion in heteronormative structures and patriarchal institutions of the family presupposes what queer ‘freedom’ should look like.⁴⁹ This is neither radical nor transformative but regulatory. It is sanctioned by a heterosexual regime in order to prove its own humanity.

⁴⁶ *Id.* Preamble.

⁴⁷ Kapur, *supra* note 7.

⁴⁸ Dianne Otto, *Queering Gender [Identity] in International Law* 33 NORDIC JOURNAL OF HUMAN RIGHTS 299, 310-311 (2015).

⁴⁹ Kapur, *supra* note 7.

C. Invisibility of Lesbian and other Non-normative Gender Subjects

Compounding queer exclusions, even when the reinterpretation of civil and political rights to provide some minimum guarantees to gay men under international human rights law has been possible, it has offered limited visibility or protection to lesbian relationships. Unhelpful for advancing the human rights of lesbian women is the largely male profile of litigants and activists for the enhanced protection of SOGI rights under international human rights law. In a brilliant analysis, Hodson identifies how the celebrated SOGI jurisprudence of the European Court of Human Rights (ECtHR) has in fact made lesbian lives invisible.⁵⁰ She names the invisibility of lesbian subjecthood in the Court's 'homosexual' subject. For example, the Court's celebrated jurisprudence under Article 8 (right to private and family life) to advance the decriminalisation of homosexuality has defined much of this jurisprudence as specific to a sexual act that homosexual men are understood to be inherently disposed to and identified by. Likewise, the UN human rights system's first case on sexual orientation concerned anti-sodomy laws.⁵¹ As Saez notes, the Human Rights Committee and the ECtHR decided these cases focusing primarily on the right to privacy, providing a small opening for gradual changes in both systems.⁵²

Whilst the specific criminalization of homosexual sex has meant that such jurisprudence has addressed only that manifestation, as Hodson identifies 'the invisible subject cannot claim

⁵⁰ Loveday Hodson, *Sexual Orientation and the European Convention on Human Rights: What of the "L" in LGBT*, 23 JOURNAL OF LESBIAN STUDIES 383 (2019).

⁵¹ *Toonen v. Australia*, *supra* note 42.

⁵² Macarena Saez, *In the Right Direction: Family Diversity in the Inter-American System of Human Rights*, 44 N.C. J. INT'L L. 317 (2019).

rights'.⁵³ Of the 125 applicants in ECtHR SOGI cases from 1955-2015, only 17 applicants were female and few of those applications were considered on their merits. In fact, no violation was found of a lesbian woman's rights by the ECtHR until 1999 in *Smith and Grady v. The UK* which challenged the prohibition of gay men and women from military service and involved both a male and female applicant. Thus, it was only in 2008 that the European Court found its first violation by a female applicant alone. This concerned adoption in *E.B. v France* (2008). More broadly, this review of the earlier unsuccessful lesbian cases evidences a clear reluctance by the court to apply article 8 protections to lesbian relationships and to lesbian families.⁵⁴

By contrast, the Inter-American system's jurisprudence on SOGI rights commenced later than that of the European human rights system and has centrally involved female family relationships, paradigmatically through the *Atala v Chile* judgment.⁵⁵ In this judgment, concerning the denial of custody rights to a female Chilean judge due to her sexual orientation as lesbian, the Inter-American Court of Human Rights (IACtHR) had to analyze whether sexual orientation was a protected category under the American Convention on Human Rights by delving into a family law case. The IACtHR held that courts cannot use the best interest of the child as a tool to discriminate against parents based on their sexual orientation. Unlike the

⁵³ Hodson *supra* note 50 at 386.

⁵⁴ *Id.* *passim*.

⁵⁵ *Atala Riffo and Daughters v. Chile (Atala v. Chile)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 239, (Feb. 24, 2012).

criminalisation of sodomy cases, *Atala* left the door open to expand the right to family to associations formed outside the legal marriage, both by heterosexual and same-sex partners.⁵⁶

These significant divergences in regional jurisprudence around lesbian lives and families places even greater importance on the UN human rights jurisprudence in this area. The landmark *Toonen v. Australia* decision of the UN Human Rights Committee addressed decriminalisation of homosexuality with a male applicant. Meanwhile, the CEDAW Committee's approach to the specific issues of discrimination faced by lesbian women has a long evolution. Between 1994 and 2001, it referred to sexual orientation in several concluding observations but then stopped doing so. In 2008, activists briefed the Committee on the impact of State and non-State violence against lesbians, bisexual women, and transgender individuals.⁵⁷ The Committee then again began to express its concern about discrimination and harassment of women because of their SOGI.⁵⁸ The Committee has typically been cautious in its approach to issues relating to discrimination against women on the ground of their sexuality. It has referred with approval to legislation which prohibits discrimination on the ground of sexual orientation⁵⁹ and has noted

⁵⁶ See further Saez, *supra* note 52.

⁵⁷ Grace Poore, *30 Years of CEDAW: Achievements & Continuing Challenges Towards the Realization of Women's Human Rights*, OURRIGHT ACTION INTERNATIONAL (last visited Aug. 4, 2022) <https://outrightinternational.org/content/30-years-cedaw-achievements-continuing-challenges-towards-realization-women%E2%80%99s-human-rights>

⁵⁸ E.g., U.N. CEDAW, Concluding Observations on the Periodic Report of Kyrgyzstan, CEDAW/C/KGZ/CO/2, para 43 (2008); Concluding Observations on the Periodic Report of Germany, Cedaw/C/DEU/CO/7, paras. 61-62 (2009).

⁵⁹ Tan Beng Hui, *Exploring the Potential of the UN Treaty Body System in Addressing Sexuality Rights*, IWRAW Occasional Paper Series, No 11, 7-11 (2007).

with concern the criminalization of same-sex relationships.⁶⁰ In its discussion of multiple discrimination in General Recommendations 27 and 28, which were both adopted in 2010, the Committee noted that women experience discrimination not only as women but also on the basis of ‘other factors’, of which sexuality is one.⁶¹ General Recommendation 28 paragraph 31 affirms that lesbian women are particularly vulnerable to discrimination, although it does not explicitly refer to bisexual, transgender, and intersexual persons. It must be noted, however, that General Recommendation 28 was adopted by majority and not by consensus at the CEDAW Committee, evidencing divisions within the Committee as to the appropriate interpretation and application of the Convention to gender non-conforming and queer women.

It took until 2022 for the CEDAW Committee – the first amongst any of the UN human rights treaty bodies – to make its first finding in an individual communication that the criminalisation of same-sex lesbian conduct is a human rights violation.⁶² One of the key findings in this case is that the criminalisation of same-sex sexual conduct between women breaches CEDAW’s article 16 rights, which relates to marriage, family relations, autonomy and choice. The Committee states that the ‘rights enshrined in the Convention belong to all women, including

⁶⁰ U.N. CEDAW, Concluding Observations on the Periodic Report of Mexico, CEDAW/C/MEX/CO/2, para 420 (1998).

⁶¹ CEDAW Committee, General Recommendation N° 27 on Older Women and Protection of Their Human Rights, CEDAW/C/GC/27 para 13 (2010); General Recommendation N° 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28 para. 18 (2010).

⁶² Flamer Caldera v Sri Lanka, Views Adopted by the Committee under Article 7(3) of the Optional Protocol, Concerning Communication N° 134/2018, CEDAW/C/81/D/134/2018 (2022). See further Christine Chinkin & Keina Yoshida, *CEDAW and the decriminalisation of same-sex relationships*, 4 EUROPEAN HUMAN RIGHTS LAW REVIEW 288 (2022).

lesbian, bisexual, transgender and intersex women’ and that it applies to ‘non-heterosexual relations’.⁶³ The Committee in this way, belatedly, underlines its commitment to inclusivity and responds to scholarly criticism that under CEDAW ‘women’s experience of ‘family life’ is assumed to be married and heterosexual’.⁶⁴

This new direction in the CEDAW Committee’s approach to lesbian relationships – and the divergence between the approaches to lesbian family rights of the European and Inter-American Court – signal one of the most appealing characteristics of the human rights system for women’s rights advocates, namely its pluralism. Drawing from diverse treaty sources, and combined with a diffuse system of treaty interpretation and norm development, there can be considerable space for the creative and resourceful advocate to advance expansive and progressive articulations of women’s rights in conflict. Likewise, it can also make ostensible progress on women’s and gender rights within one treaty system or body more difficult to consolidate across international human rights law.⁶⁵

IV. THE WOMEN, PEACE AND SECURITY AGENDA AND ITS QUEER EXCLUSIONS

A. The Gender Binary

The WPS agenda is most legible as a set of ten Security Council resolutions beginning with the Security Council 1325 on Women, Peace and Security. In part, the limitations of the gender

⁶³ *Id.* para. 9.7

⁶⁴ Chinkin & Yoshida, *supra* note 62 at 295.

⁶⁵ Consider the diverse approaches in access to abortion under the different treaty monitoring bodies, see further Christina Zampas & Jaime M. Gher, *Abortion as a Human Right – International and Regional Standards*, 8 HUMAN RIGHTS LAW REVIEW 249 (2008).

binary undergird the forum shift to bring women's rights to the Security Council in the first place. Women's rights activists recognized the limitations of producing peace and security efforts through a gender perspective that only prioritized the visions of men. The mobilizing for the resolution was a forum shift to the Security Council as a means to get women not only to the peace table during peace talks, but also women's rights onto the agenda in security spaces where women were otherwise excluded.⁶⁶ As Resolution 1325 drew attention for its symbolic importance as a means to include women in peace and security efforts, practical concerns about weak provision for implementation quickly emerged.⁶⁷ In response to such concerns, nine additional WPS resolutions have been adopted. Four focus broadly on advancing the women's participation pillars.⁶⁸ Five focus on sexual violence in conflict.⁶⁹ These additional resolutions have extended the breadth and depth of Resolution 1325, made provision for the implementation of the overall WPS agenda and engaged a broad range of member States willing to lead adoption of additional resolutions on this issue.

Yet, peace and security initiatives continue to discuss women as part of a binary in opposition to men, reverting to essentialism while also failing to account for the broad diversity of gender identities.⁷⁰ Furthermore, the patriarchal limitations of the Security Council continued to

⁶⁶ Cockburn, *supra* note 25. Anderlini, *supra* note 25.

⁶⁷ *Id.*

⁶⁸ S.C. Res. 1889 (Oct. 5, 2009); S.C. Res. 2122 (Oct. 18, 2013); S.C. Res. 2242 (Oct. 13, 2015); S.C. Res. 2493 (Oct. 29, 2019).

⁶⁹ S.C. Res. 1820 (June 19, 2008); S.C. Res. 1888 (Sep. 30, 2009); S.C. Res. 1960 (Dec. 16, 2010); S.C. Res. 2106 (June 24, 2013).

⁷⁰ See, for example Laura J. Shepherd & Laura Sjoberg, *Trans-Bodies in/of War(s): Cisprivilege and Contemporary Security Strategy*, FEMINIST REVIEW 5 (2012); Robert C. Mizzi & Sean Bryne, *Queer Theory and Peace and Conflict Studies: Some Critical Reflections in GENDER AND PEACEBUILDING: ALL HANDS*

hamper the ability for women to be agents of change rather than merely victims in conflict.⁷¹ The definition of gender as operationalized within the WPS agenda generally upholds the gender binary too, with little attention to how heteronormativity and cis-privilege both shape peace and security spaces. The gender binary as mobilized by the WPS agenda results in significant limitations to any meaningful queer inclusion or queering of programmatic WPS initiatives when there is no acknowledgement of the relevance to sexuality, sexual orientation or gender identity as it relates to a gender perspective.⁷² The slippage of using gender to mean women has led to a number of challenges when it comes to implementing a more inclusive gender perspective in WPS work. Rather than a unified approach to addressing gender-based violence (GBV) perpetrated against all individuals, a siloing has occurred between those looking at violence against (heterosexual) women and violence experienced by men and from LGBTQ communities who are often presented as a third and separate category of survivors.⁷³

B. Heteronormativity

Responses to the need to confront the heteronormativity of WPS through efforts to prioritize LGBTQ inclusion, or a queering, of the WPS agenda echo the trajectory of these efforts in IHRL. The behind-the-scenes debates about the discourse of gender do not always surface, however in 2019 one example of how state resistance can limit queer inclusion in the

REQUIRED 359 (Maureen P. Flaherty, Thomas G. Matyók, Sean Bryne & Hamdesa Tusso, eds., 2015); Lauren Wilcox, *Practising Gender, Queering Theory*, 43 *REVIEW OF INTERNATIONAL STUDIES* 789 (2017).

⁷¹ Nadine Puechguirbal, *Discourses on Gender, Patriarchy and Resolution 1325: A Textual Analysis of UN Documents*, 17 *INTERNATIONAL PEACEKEEPING* 172 (2010).

⁷² Hagen, *supra* note 6.

⁷³ Meredith Loken & Jamie J. Hagen, *Queering Gender-Based Violence Scholarship: An Integrated Research Agenda*, *INTERNATIONAL STUDIES REVIEW* (forthcoming 2022).

resolutions made international news. In the drafting of Resolution 2467, accounts reveal how both the United States and Russia attempted to advance domestic homophobic and transphobic policies through their Security Council membership through efforts to remove the word ‘gender’ and replace it with ‘woman’. Further, regressive forces were effective in their efforts to remove references to sexual and reproductive health for women who had been raped in conflict.⁷⁴ These negotiations are just one of many calculated decisions that have gone into the drafting of the resolutions and the gender perspective these resolutions are able to promote. Considering the powerful role that WPS resolutions play in the broader landscape of international security policy about gender, the implications of these debates over what issues are relevant to the agenda are far reaching.⁷⁵

Because the Security Council resolutions must avoid the veto of the five permanent members in order to be adopted, the watering down of resolutions from more progressive language has been common. The make-up of the Security Council magnifies the damaging impact of those states – prominent amongst the permanent members – unwilling to commit to a more expansive vision for gender at international level, resulting often in mediocre commitments and vague resolutions.⁷⁶ These tensions came to the fore with the ultimate rejection of a draft resolution proposed by Russia to mark the 20th anniversary of the WPS agenda. Mobilised by concerns

⁷⁴ Louise Allen & Laura Shepherd, *In Pursuing a New Resolution on Sexual Violence Security Council Significantly Undermines Women’s Reproductive Rights*, LSE WPS BLOG (25 April 2019) <https://blogs.lse.ac.uk/wps/2019/04/25/in-pursuing-a-new-resolution-on-sexual-violence-security-council-significantly-undermines-womens-reproductive-rights/>.

⁷⁵ Paul Kirby & Laura J Shepherd, *Women, Peace, and Security: Mapping the (Re)Production of a Policy Ecosystem*, 6 JOURNAL OF GLOBAL SECURITY STUDIES 1 (2021).

⁷⁶ Soumita Basu, *Gender as a National Interest at the Security Council*, 92 INTERNATIONAL AFFAIRS 255, 269 (2016).

about the need to ‘protect’ the WPS agenda from efforts to ‘watering down previously agreed standards on core issues’, civil society successfully mobilised to have several Security Council members vote against the draft resolution.⁷⁷ A lack of clear agreement on a more expansive attention to gender and sexuality diversity – and the absence of positive definitions of these terms under international human rights law – has left a vacuum around what the terms ‘gender’ and ‘women’ mean, allowing for violent rhetoric to fill this void, and in some cases fuel transphobic and queerphobic claims. The debate over the use of the word ‘gender’ specifically has been further heightened by the anti-gender backlash in recent years.⁷⁸

C. Invisibility of non-Normative Gender Subjects

In the WPS agenda, the invisibility of non-normative gender subject has certainly manifested in lesbian invisibility and the agenda’s unspoken assumption of a female heterosexual subject. Perhaps more surprisingly, the invisibility of the non-normative gender subject has manifested also in the agenda’s attempts to ‘engage men and boys’. The second decade of the WPS agenda made efforts to more prominently address the role of men in promoting a gender perspective in peace and security work. Resolution 2106 passed in 2013 call for ‘engagement’ with men, while Resolution 2242 passed in 2015 calls for the ‘enlistment’ of men.⁷⁹ This engagement work is uneven at best. Scholars have examined how these efforts in the WPS agenda point to key tensions such as the dilution of feminist initiatives, the inability to hold men accountable

⁷⁷ See further NGO Working Group on WPS, *Security Council Members Unite to Protect the Women, Peace and Security Agenda on Its 20th anniversary* (Oct. 30, 2020) <https://www.womenpeacesecurity.org/blog-unscc-protect-wps-agenda-20th-anniversary/>

⁷⁸ Elizabeth S. Corredor, *Unpacking ‘Gender Ideology’ and the Global Rights Antigender Countermovement*, 44 *SIGNS JOURNAL OF WOMEN IN CULTURE AND SOCIETY* 613, 624-625 (2019).

⁷⁹ S.C. Res. 2106, *supra* note 69; S.C. Res. 2242, *supra* note 68.

in much work led by the ‘good men’ industry, as well as the reification and continued privileging of men as necessary ambassadors for change for women.⁸⁰ The agenda engages men either as (potential) perpetrators of violence against women, or – to a lesser extent – as victims of sexual violence. Manifold complex gender identities are therefore occluded, including civilian male experiences of conflict, such as male carers, as well as those of queer and displaced men.

Tensions around the place of men in the WPS agenda have also emerged over the question of how to draw attention to sexual violence against men, given that so much humanitarian programming to respond to sexual and GBV is developed to support women as survivors of sexual violence at the hands of male perpetrators.⁸¹ A debate between Jane Ward and Chris Dolan in the *International Review of the Red Cross* illustrates the way this tension in the field of humanitarian emergency response. Ward writes:

While it is a positive development that the needs of male survivors and LGBTQ populations in humanitarian settings have been brought into sharper focus as a result of the human rights approaches that underscore GBV interventions, it is a misrepresentation of GBV theory and practice to claim that males and LGBTQ groups should attract equal focus in GBV programming. Vitiating the gender and GBV language in order to refocus the field towards attention to the needs of males and

⁸⁰ David Duriesmith, *Engaging Men and Boys in the Women, Peace and Security Agenda: Beyond the ‘Good Men’ Industry*, LSE BLOG (Dec. 15, 2017) <https://blogs.lse.ac.uk/wps/2017/12/15/engaging-men-and-boys-in-the-women-peace-and-security-agenda-beyond-the-good-men-industry-david-duriesmith-112017/>

⁸¹ See ELISE FERON, WARTIME SEXUAL VIOLENCE AGAINST MEN: MASCULINITIES & POWER IN CONFLICT ZONES (Men and Masculinities in a Transnational World 2018).

LGBTQ populations is not likely to serve any of these groups effectively, least of all women and girls.⁸²

In a response, Dolan notes that ‘accessing appropriate support services which work for all survivors regardless of gender is a struggle that is particularly acute’ for men and LGBTQ persons. Ward’s argument reflects an anxiety of losing hard-won attention to women’s experience of GBV in conflict. Dolan’s response reflects his experience working with the Refugee Law Project supporting male and LGBTQ survivors in Uganda. Both point to the contested terrain over what gender means and how/if to include men as well as LGBTQ individuals in this meaning. Tensions around the treatment of male victims within feminist campaigns for change clearly pre-existed the WPS agenda, but have crystallized in particular ways through the WPS agenda. Concerns about ‘diluting the agenda’ can serve to uphold a limiting vision for WPS, focusing primarily on the experiences of heterosexual women rather than a broader analysis of gender.

V. SEXUAL DANGER NOT SEXUAL RIGHTS

A. International Human Rights Law

The continuities and legacies of human rights law’s queer exclusions are most acute in the WPS agenda’s reliance on sexual danger to drive legal and normative developments. Clear tensions emerged between feminist campaigns in international human rights law to end GBV and

⁸² Jane Ward, *It’s Not About the Gender Binary, It’s About the Gender Hierarchy: A Reply to “Letting Go of the Gender Binary”* 98 INTERNATIONAL REVIEW OF THE RED CROSS 275, 279.

feminist campaigns for sexual and reproductive rights, based on the pleasure motive.⁸³ In practical terms, one might ask at what points has women's sexual agency and freedom (pleasure) underpinned human rights claims. The low profile of such demands, especially when contrasted with advocacy to end sexual violence (danger), especially in armed conflict, and its connection to carceral feminism in human rights law, is striking. This contrast between outcomes grounded in pleasure or danger is particularly acute when considering the outcome documents of the 1993 Vienna Conference on Human Rights. In contrast with the priority given in the Vienna Declaration to ending violence against women, sexual orientation is condemned nowhere as a ground for discrimination, in line with the later Beijing Declaration. Likewise, these tensions are clear in how the Vienna Declaration addresses sexual and reproductive rights, which primarily addresses sexuality as the freedom from sexual violence, harassment, and trafficking,⁸⁴ manifesting yet again the enduring victim trope in women's human rights protections.

Importantly, the UN's International Conference on Population and Development in Cairo in 1994 offered glimpses of a new and potentially more progressive approach. At Cairo, we see the new idea of 'reproductive health' which was understood to include sexual health. In fact, in the outcome document, this is articulated as 'a satisfying and safe sex life',⁸⁵ a concept much closer to what Otto calls 'pleasure'. This language is taken up in Beijing too under reproductive

⁸³ See Dianne Otto, *Between Pleasure & Danger: Lesbian Human Rights* 6 EUROPEAN HUMAN RIGHTS LAW REVIEW 618 (2014).

⁸⁴ See, for example, The World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23, paras. 17, 18, 38 (June 25, 1993).

⁸⁵ The International Conference on Population and Development, *Programme of Action* (Cairo, Sep. 5-13, 1994) para.7.2.

health.⁸⁶ Regrettably, however, these modest developments at Cairo and then Beijing prove short-lived. They find little trace in contemporary articulations of human rights. International human rights law has instead dealt with sexuality primarily to the end of defining ‘acceptable’ sex.⁸⁷ Human rights law responses to prostitution and trafficking, for example, evidence the persistent treatment of sexuality as dangerous for women. ‘Acceptable’ sex therefore takes place within monogamous marriage; it is presumed heterosexual; and understood only in reproductive terms. ‘Acceptable’ sex is the opposite of risky criminal indecent and pathological other ‘sex’ of human rights law. Notably, this critique of ‘acceptable sex’ under international human rights law has become more acute with the increasing visibility of sexual and gender minorities in human rights law. Some queer scholars characterise engagements such as the Yogyakarta Principles and the mandate of the UN Independent Expert on SOGI as inherently deradicalizing.⁸⁸ Ratna Kapur, in particular, sees such developments as meaning that queer advocacy in human rights law is now doing the regulation work of sexual rights that it sought to challenge.⁸⁹

What is clear from the above discussion is that binaries and hierarchies that underpin gender do not concern only gender. Rather, they are deeply imbricated in colonial and racist binaries and hierarchies. This is evidenced in international women’s rights narratives about which women are most vulnerable to sexual violence as well as what is necessary to ‘secure’ women against these harms. In a pathbreaking critique of the human rights canon’s focus on sexual

⁸⁶ The Fourth World Conference on Women, *Beijing Declaration and Platform of Action*, U.N. Doc. A/CONF.177 and A/CONF. 177/20/Add. 1 (Oct. 27, 1995) para. 94.

⁸⁷ Otto, *supra* note 48, at 304

⁸⁸ Kapur, *supra* note 7.

⁸⁹ *Id.* at 146.

danger, Kapur has provided particularly compelling analysis of the gendered and racialised binaries that define human rights.⁹⁰ She critiques the production of the ‘authentic victim subject’ through advocacy to end GBV under human rights law. According to Kapur this ‘authentic victim subject’ is in fact a third world woman victim subject. Moreover, she reveals how the gender and cultural essentialism of the violence against women campaigned works to buttress politics that are not emancipatory for women. Kapur too starts her intervention with Vienna in 1993 and its focus on GBV. Here she identifies the emergence of the hegemonic victim subject as a shared location from which different cultural and social contexts can speak. However, critically, she identifies how this strategy relies on overly generalised claims about women that ignores intersectionality and that essentialise non-western cultures, in particular by positioning non-western women as victims of culture. According to Kapur, the essential problem of human rights law is how it invites responses and remedies from states that have little to do with promoting women's rights.

B. Women, Peace and Security

Much of the focus of the WPS resolutions continues to be on accounting for, responding to and preventing ‘rape as a weapon of war’.⁹¹ A focus on sexual violence in conflict began with WPS Resolution 1820 (2008) and was affirmed in Resolution 1888 just a year later. The emphasis on sexual violence does fall within three of four pillars (prevention, protection and relief and recovery), and is arguably one of the most palatable ways to implement the WPS agenda. This palatability is in part because of the ability to frame the issue within the tropes about women

⁹¹ Paul Kirby, *How Is Rape a Weapon of War? Feminist International Relations, Modes of Critical Explanation and the Study of Wartime Sexual Violence* 19 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 797 (2012).

in conflict in need of protection. Marking the 10-year anniversary of the WPS agenda, Resolution 1960 (in 2010) established monitoring, analysis, and reporting arrangements (MARA) which are the basis of this carceral feminist critique. For example, it was in this resolution that the Secretary-General is requested to ‘list’ perpetrators of the sexual violence when reporting to the Security Council as a mechanism for informing Security Council activities in respect of particular conflict situations, including its potential use of sanctions or even use of force.⁹² This ‘listing’ procedure is the clearest basis to critiques of the WPS agenda’s endorsement of securitisation and militarisation that are ultimately antithetical to women’s and gender rights.⁹³

The ‘listing’ procedure is usefully viewed among a growing number of worrying Security Council ‘robust peacekeeping’ mechanisms linked to protecting women, children (or ‘womenandchildren’) and wildlife.⁹⁴ These mechanisms may also support homonationalist claims justifying the use of force to protect LGBTQ communities. Gender theory locates sexual violence within roots of hegemonic masculinity and patriarchy during conflict, understanding it as part of a continuum of violence. This continuum situates gendered violence (including homophobia and transphobia) as an extension of violence present during times of peace.⁹⁵ By contrast, ‘listing’ and similar exercises of Security Council power limit the focus to ‘rape as a

⁹² O’Rourke, *supra* note 12, at 101.

⁹³ Gina Heathcote, *Women and Children and Elephants as Justification for Force*, 4 JOURNAL ON THE USE OF FORCE & INTERNATIONAL LAW 66 (2017).

⁹⁴ *Id.*

⁹⁵ Further see AISLING SWAINE, *CONFLICT-RELATED VIOLENCE AGAINST WOMEN: TRANSFORMING TRANSITION* (CUP 2018).

weapon of war' that turn to carceral solutions to criminalize individual perpetrators, rather than appeal to systemic change.

The emphasis on 'sexual danger' to drive change in international law's treatment of women at the Security Council has clear continuities from earlier engagements with the international human rights system, which has prompted some interrogation. Karen Engle, for example, revisits the history of women's human rights organizing and turns to what women's rights issues and questions are left out by this shift in advocacy towards the criminalization of sexual harm.⁹⁶ Pointing to the 'problematic common sense' which has developed around the move towards criminal law, she instead notes that this path was not an obvious direction for this movement to follow. Importantly she notes this path has led to frameworks of criminalization, militarization and securitization and a clear departure from feminist motivations for peace. Also left behind is attention to other gendered harms, anti-imperialism and investment in what victims want other than 'bringing perpetrators to justice'. Rather than seeing this move towards a focus on sexual violence because of co-optation as some have argued, Engle points to this shift as a buy-in to this approach by women's rights movements out of a desire to be included in international human rights law, international criminal law and, most potently, within the activities of the Security Council.

A pressing question for those committed to the WPS agenda as an agenda for feminist emancipation is what role, if any, the forum of the Security Council should play in addressing harms against LGBTQ people in conflict. The significantly differing views on this question illustrate the underlying challenges for how best to move forward with WPS interventions.

⁹⁶ KAREN ENGLE, *THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW* 134 (Stanford University Press 2020).

Take for example the 2015 Arria-Formula ‘Open Meeting on Vulnerable Groups in Conflict: ISIL’s Targeting LGBT Individuals’ where the LGBTQ organization Outright Action International put forward the experiences of LGBTQ Iraqis to members of the Security Council.⁹⁷ The group, along with MADRE and Organization for Women’s Freedom in Iraq held the forum to bring attention to the way ISIS was targeting LGBTQ Iraqis as a part of the ongoing conflict. The Arria-Formula was the first to address LGBTQ violations in conflict and in doing so make the connection of WPS agenda and LGBTQ inclusion, and one of the first looks at violence against LGBTQ people as a part of violent conflict. In an assessment of the event by Lisa Davis (of Madre) and Jessica Stern (of Outright), the authors detail the important roles of U.S. Ambassador Samantha Power who spoke at the event and the Permanent Missions of Chile and the United States who co-hosted the event.⁹⁸ Davis and Stern’s account of the Arria Formula is unambiguously positive about this ‘big step forward’ within the ‘powerful Security Council itself’.⁹⁹

But returning to Kapur’s critique of international human rights law interventions as a form of regulating sexuality, just how connections between conflict harms against LGBTQ people and the mandate of the Security Council are being made requires closer observation.¹⁰⁰ The need

⁹⁷ Jessica Stern, *The U.N. Security Council’s Arria-Formula Meeting on Vulnerable Groups in Conflict: ISIL’s Targeting of LGBTI Individuals*, 48 JOURNAL OF INTERNATIONAL LAW AND POLITICS 1391 (2016).

⁹⁸ Lisa Davis & Jessica Stern, *WPS and LGBTI Rights in THE OXFORD HANDBOOK OF WOMEN, PEACE AND SECURITY* 657 (Sara E. Davies & Jacqui True eds., 2019).

⁹⁹ *Id.* at 660.

¹⁰⁰ See Matthew Waites, *Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics Beyond the Yogyakarta Principles* 15 CONTEMPORARY POLITICS 137 (2009); Michael J. Bosia, *Do Queer Visions Trouble Human Security?* in THE ROUTLEDGE HANDBOOK OF GENDER & SECURITY Chapter 8 (Caron E. Gentry, Laura J. Shepherd & Laura Sjoberg eds., 2018).

for critical observation is especially true when considering the case of Iraq where nearly 95% of the population is Muslim. Given the persistent trope that Islam is inherently anti-LGBTI, presenting Iraq as a site of homophobic violence, whilst urging action, potentially even intervention, by actors in the Security Council is cause for deeper reflection.

VI. CONCLUSION: NEW DIRECTIONS FOR QUEERING WPS

The article has sought to delineate, for the first time, the antecedents of contemporary feminist and queer critique of the WPS agenda within the long-established limitations of international law and international human rights law. The article's key contribution is therefore descriptive and historical, connecting contemporary problems to older ones. Further, through the lens of 'forum-shifting', the article has sought to highlight how the decision to target the Security Council, and to move away from the consensus-based systems of the UN General Assembly and international human rights to the coercive power of the Security Council, has heightened rather than resolved these problems. As scholars with activist commitments, we conclude the article with some – inevitably flawed and partial – proposals for a way forward.

Feminist disillusionment with the Security Council has arguably reached its zenith. Frustrated by decades of undelivered commitments,¹⁰¹ and further catalysed by Security Council failures on COVID-19,¹⁰² and forced inaction in response to Russian aggression in Ukraine,¹⁰³ questioning the utility of continued feminist engagement with the Security Council is

¹⁰¹ Global Study, *supra* note 2.

¹⁰² Catherine O'Rourke, *International Law, COVID 19 and Feminist Engagement with the United Nations Security Council: The end of the Affair?* FEMINIST LEGAL STUDIES 321 (2020).

¹⁰³ See further G.A. Res. ES-11/1, United for Peace (Mar. 2, 2022).

increasingly mainstream.¹⁰⁴ What Chinkin and Rees identify, baldly, as the ‘failure of the normative agenda’,¹⁰⁵ has led to their arguments for a re-focusing on the human rights system as a more propitious avenue for the pursuit of the WPS agenda. We endorse this proposal for creative engagement across the institutions of international law, in particular the human rights system.

The human rights system, for all the shortcomings that are comprehensively rehearsed in this article, nevertheless may offer openings for re-envisioning of both human rights and WPS. We tentatively propose this as a possible way forward for a number of linked reasons. First, we note the glimpses of a more promising and queer-inclusive approach to human rights in sites such as the Cairo and Beijing endorsement of sexual rights to a ‘safe and satisfying sex life’, as well as the more promising recent direction of some queer-inclusive human rights approaches to family rights. Second, the identified pluralism of the human rights system operates in ways that differ in important respects from the Security Council’s coercive power. Although a halting and contingent process, it is the diversity and pluralism of international human rights law that provides unique opportunities for more feminist and queer-inclusive interpretations to enter the mainstream of international law. Third, the human rights system is explicit about its dependence on civil society for implementation, monitoring and

¹⁰⁴ Christine Chinkin & Madeleine Rees, *Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict*, CENTRE FOR WOMEN PEACE & SECURITY 4, 24-27.

¹⁰⁵ *Id.*, at 24.

enforcement,¹⁰⁶ and civil society is a critical source for subaltern and queer-inclusive interpretations of human rights.

Formal ‘successes’ for queer inclusion in the human rights system – most notably the mandate of the Independent Expert on SOGI by the Human Rights Council – illustrate how much of the most meaningful work for LGBTQ people at the UN continues to be at the level of theory-building and evidence-gathering. Moored by its formal mandate to a sexual danger and violations-focused vision of human rights,¹⁰⁷ the mandate-holder has nevertheless found ways to operate with considerable creativity to ensure queer and trans-inclusion in reporting about gender. For example, the 2021 Gender Theory report presented to the Human Rights Council incorporates findings from hundreds of submissions and the current call for the 2022 report on Peace and Security to be presented to the General Assembly is likely to do the same.¹⁰⁸ The launch of this new report by the Independent Expert may prove valuable for opening up conversations for queer inclusion in WPS, as well as pointing to the continuing failures and limitations of gender work when it comes to serving LGBTQ communities. Further, as work on ‘feminist insiders’ reveals,¹⁰⁹ it matters that there are now openly queer people working within the UN, and queer experience and expertise informing the interpretation of both human rights and international peace and security.

¹⁰⁶ See, for example, CEDAW Committee, *Statement on its relationship with non-governmental organisations*, OHCHR (Oct. 4, 2010) <https://www.ohchr.org/sites/default/files/documents/HRBodies/CEDAW/Statements/NGO.pdf>.

¹⁰⁷ Human Rights Council Res. 32/2 U.N. Doc. A/HRC/RES/32/2 (Jun 30, 2016).

¹⁰⁸ *Report of the Independent Expert on Sexual Orientation and Gender Identity, The Law of Inclusion* U.N. Doc. A/HRC/47/27 (2021).

¹⁰⁹ O’Rourke *supra*, note 12, at 357-358.

Finally, the WPS agenda exists well-beyond the resolutions of the Security Council and this realisation centres the work of feminist and queer civil society, who continue to localize and domesticate the WPS agenda. There is an opportunity in the next decade of WPS efforts to support queer inclusion, especially in the push for localization, funding the grassroots, and supporting a WPS agenda that is not formed solely inside the Security Council, but may also be progressively advanced through human rights law.¹¹⁰ The WPS forum-shift to the Security Council to bring attention to women's experiences in conflict illustrates an effort to repurpose an international security forum to confront issues well-beyond its formal mandate. We believe the next decade of WPS offers opportunities for more positive and productive forum-shifting, informed by the hard-learned lessons of the past, to diverse spaces of queer inclusion.

¹¹⁰ Kirby & Shepherd, *supra* note 75.